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In the Supreme Court of the United States

October Term, 1986

AGENCY HOLDING CORPORATION, ET AL.,
Petitioners
vs.
MALLEY-DUFF & ASSOCIATES, INC.
Respondent

CROWN LIFE INSURANCE COMPANY, ET AL.,
Petitioners
vs.
MALLEY-DUFF & ASSOCIATES, INC.,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONERS CROWN LIFE INSURANCE COMPANY AND CLARKE BURTON LLOYD

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STATEMENT OF THE CASE

In its Statement of the Case as well as in its Statement of the Facts the respondent uses argumentative and conclusory adverbs and adjectives in an effort, as it did below, to color the Court's approach to this case. For example, it alleges that certain "conspirators" used various Crown Life Insurance Company* agencies to divert vast sums of money from defendant Crown Life. Needless to say, even RICO does not give a cause of action to a plaintiff against a defendant because of sums allegedly diverted from that defendant.

The respondent also mixes its references to "Craig and the Agency Holding Defendants" with the term "defendants." This mixing together may lead the Court to believe that Crown Life and Clarke Burton Lloyd had knowledge of the alleged activities of Kerry Craig's then attorney (now deceased) and Craig.

Respondent well knows that neither Crown Life nor Lloyd had any prior knowledge of the use of a shredding machine at the Chicago office of Agency Holding. The trial judge so instructed the jury at the end of the five-week trial of *Malley-Duff I.* (Tr. 3264). Nor did they have any knowledge that a private detective had been engaged by Craig or his then attorney until that information was disclosed by Craig at his deposition. (Sanctions hearing, June 1, 1979, p. 454). At the conclusion of the sanctions hearing initiated by the respondent prior to the filing of the complaint in this case, the District Judge acknowledged that there was no indication that the attorneys for Crown Life and Lloyd had any involvement at all in hiring the private detective. (Sanctions hearing, June 5, 1979, p. 696).

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*Rule 28.1 information was supplied in Petitioners' principal brief.

STATEMENT OF THE FACTS

Many of the respondent's conclusory statements for which reference is made to the trial transcript and exhibits submitted at trial are not supported by the record. Two of the classic misstatements are contained on the first page of the Statement of the Facts. In the first misstatement the respondent says that Agency Holding Corporation was controlled directly by Lloyd. Respondent cites as authority exhibit 5008. This exhibit, an internal Crown Life correspondence concerning the procedure for approval of loans to agencies, contains no reference to Agency Holding. By a letter to the clerk of this Court dated April 8, 1987, counsel for respondent states that the reference to the exhibit was a typographical error. He does not, however, supply a correct or substitute reference to support the misstatement. Lloyd has never owned any stock of Agency Holding. Craig, who has owned 100% of the stock of Agency Holding since he started to work there in 1977, gave Lloyd a job in September, 1981, but fired him in January, 1983. Lloyd has had no employment or other relationship with Agency Holding since January, 1983.

In the second paragraph of the Statement of Facts, respondent states: "Until 1981, Crown vested him (Lloyd) with complete power to appoint and terminate General Agents." The transcript references cited for that quote are transcript 95, 172-73, and 1242-43. The first two references contain no statements concerning Mr. Lloyd's alleged power to terminate General Agents. On Tr. 1242, an employee of Crown Life states, "He had the authority to recommend termination of General Agents. I don't know if he had the power to actually put it into action." The testimony in *Malley-Duff I* was clear that Michael Hutchison, Lloyd's superior, had the power to terminate and that

Lloyd could only recommend. (Tr. 2679.) These two misstatements on the first page of the Statement of the Facts are an indication of the inaccuracies contained in the respondent's Statement of the Facts in an effort to paint a picture that is contrary to reality.

ARGUMENT

I. This Court Should Adopt A Simple Approach To Selecting The One Most Appropriate Statute Of Limitations For All Civil RICO Claims In Each State.

The respondent's brief criticizes the approach recommended by petitioners by saying: "Defendants' contention that the state personal property injury statutes are most analogous to RICO is narrow and simplistic." Page 20. Later it says: "This approach is simplistic and unworkable." Page 27-28.

This Court has not rejected a solution to a problem just because the solution is simple and uncomplicated: "In this light, practical considerations help to explain why a *simple*, broad characterization of all § 1983 claims best fits the statute's remedial purpose." *Wilson v. Garcia*, 471 U.S. 261, 272 (1985) (emphasis supplied). "The *simplicity* of the admonition in § 1988 is consistent with the assumption that Congress intended the identification of the appropriate statute of limitations to be an uncomplicated task for judges, lawyers, and litigants, rather than a source of uncertainty, and unproductive and ever increasing litigation." *Id.* at 275. (Emphasis supplied.) "The federal interests in uniformity, certainty and the minimization of unnecessary litigation all support the conclusion that Congress favored this *simple* approach." *Id.* (Emphasis supplied.)

In *Wilson* this Court stated, "Had the 42d Congress expressly focused on the issue decided today, we believe it would have characterized § 1983 as conferring a general remedy for injuries to personal rights." *Id.* at 278. The 91st Congress expressly conferred on private RICO plaintiffs a general remedy for injuries to business or property. 18 U.S.C. § 1964(c).

Applying the statute of limitations for injury to business or property in each state would create uniformity in each state and would be easy to apply. Respondent and HMK Corporation, amicus curiae in support of the respondent, point out that the activities creating a RICO cause of action may not necessarily take place in a single state. They point out, for instance, that the alleged activities in this case took place in Chicago, Illinois, Cleveland, Ohio, and other states. What they ignore, however, is that the injury took place in only one state, and it is the injury to business or property for which a cause of action was given, not the activities that formed the pattern.

The petitioners' approach will not result in any more forum shopping than would be involved with a federal statute of limitations, because prudent counsel would still have to consider bringing the RICO claim in a state with a limitations period that will support claimants' common law claims for injury to their business or property.

Respondent also rejects the solution proposed by the petitioners because it says that in many states there are specific statutes that differ based upon the type of injury to a person's business or property and points out that the statute of limitations for a business injury caused by fraud could be different from the general statute for injury to personal or real property or business. Page 21. This view emphasizes looking at the cause of the injury rather than

the nature of the injury or interest being protected, and it is the very view that was rejected by this Court in *Wilson*, where this Court said, "This § 1983 claim is arguably analogous to distinct state tort claims for false arrest, assault and battery, or personal injuries." *Id.* at 273. The Court then went on to hold that all § 1983 claims, regardless of how the injury occurred, would be best characterized as personal injury actions. *Id.* at 276, 277, 280.

In many states the general statute of limitations for injury to personal rights is different from the statute of limitations for such specific torts as assault, battery, false imprisonment, libel or slander. For example, in Arizona the statute of limitations for injuries done to another is two years, Ariz. Rev. Stat. Ann. § 12-542 (1978 and Supp. 1986-87), whereas the statute of limitations, for false imprisonment, libel and slander is one year. Ariz. Rev. Stat. Ann. § 12-541 (1978 and Supp. 1986-7). In Nebraska the statute of limitations for injury to the rights of the plaintiff not arising in contract or otherwise enumerated is four years, Neb. Rev. Stat. § 25-207 (1985), whereas the statute of limitations for false imprisonment, assault and battery, libel and slander is one year. Neb. Rev. Stat. § 25-208 (1985). In New Jersey there is a two-year statute for injury to the person by wrongful act, N.J. Stat. Ann. § 2A: 14-2 (West 1982 and Supp. 1986), but a one-year statute for libel and slander. N.J. Stat. Ann. § 2A: 14-3 (West 1982 and Supp. 1986). In Virginia there is a two-year statute for personal injury, Va. Code Ann. § 8.01-243 (1984 and Supp. 1986), and a one-year statute for libel, slander and malicious prosecution. Va. Code Ann. § 8.01-248 (1984 and Supp. 1986). These are but a few of the examples which

point out that the simple solution proposed by the petitioners is analogous to the solution to the § 1983 statute of limitations problem provided by this Court in *Wilson.*

II. A Federal Statute Of Limitations Should Not Be Adopted Because The State Statutes Of Limitations Would Not Frustrate The Federal Purpose Of RICO.

The respondent, and amici curiae who submitted briefs in support of the respondent, appear to focus their arguments on their contention that this Court should legislate a four-year statute of limitations for all civil RICO claims. They cite several law review articles in support of their position. Most of these articles, however, were written prior to *Wilson*, and many of the problems raised in the articles would be resolved by a simple approach following the *Wilson* example.[1] Furthermore, some of the articles acknowledge that it should be left to the Congress to enact a federal statute of limitations.[2] This Court has on other occasions questioned the wisdom of the breadth of the RICO remedy, but has said that a narrowing of that scope is to be done by Congress and not the Court. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 105 S. Ct. 3275, 3287 (1985). Similarly, enacting a specific federal statute of limitations for all private RICO causes of action is the responsibility of the Congress, rather than this Court, when the statute of limitations provided by the states for injuries to

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[1]Special Project, *Time Bars in Specialized Federal Common Law: Federal Rights of Action and State Statutes of Limitations*, 65 Cornell L. Rev. 1011 (1980); Note *Civil RICO: A Call For a Uniform Statute of Limitations*, 13 Fordham Urb. L. J. 205 (1985); Note, *Civil RICO: Searching for the Appropriate Statute of Limitations in Actions under Section 1964(c)*, 14 Loy. U. Chi. L. J. 765 (1983).

[2]ABA Section of Corporation, Banking and Business Law, *Report of the Ad Hoc Civil RICO task Force* (1985); Special Project, *supra*, n. 1, at 1043-45, 1105.

property or business are not inconsistent with the purposes of RICO. Pennsylvania's two-year statute of limitations for injury to business or property will not frustrate or interfere with the implementation of any national policy.

A. *Legislative History.*

The first proposals to Congress for RICO-type legislation were made in the 90th Congress. Bill S.2048 would have amended the Sherman Act, 15 U.S.C. § 1, to prohibit the investment of unreported income in interstate business. As an amendment to the antitrust laws, the four-year statute of limitations enacted in 1955 would have been applicable. Bill S.2049 prohibited investments in interstate business with funds derived from listed criminal activities. It explicitly provided a four-year statute of limitations for civil actions. No action was taken on S.2048 or S.2049. They were later consolidated in an independent bill and reintroduced in the 91st Congress as Bill S.1623 in March, 1969. The suggested civil action provisions of that bill were accompanied by a four-year statute of limitations. After initial committee hearings, Bill S.1861 was introduced refining S.1623. S.1861 deleted the provision for private civil remedies and the accompanying statute of limitations. Bill S.30, containing RICO, followed S.1861 and was passed by the Senate with no provision for private civil remedies.

The House Committee on the Judiciary added private civil remedies to S.30. Bill H.R.19586 was identical to the Senate version of S.30 in relevant parts but provided for private civil actions. It did not contain a statute of limitations. Bill H.R.19215 paralleled H.R.19586 and also contained a statute of limitations. The House Committee on the Judiciary passed over H.R.19215 and chose the language of H.R.19586, providing private civil actions but no

statute of limitations. A floor amendment to provide a statute of limitations and other provisions was offered by Representative Steiger but was withdrawn. The Senate did not again specifically consider whether to include a statute of limitations, but concurred with the House's version of S.30, which, in October, 1970, became the RICO statute as we know it.

In the 92d Congress, Senators McClellan and Hruska introduced Bill S.16. S.16 would have amended RICO by providing a *five*-year statute of limitations and other civil remedies. The Senate passed S.16 but the House refused to consider it. In the 93d Congress, Bill S.13, which was identical to S.16, passed the Senate by a voice vote, but it, too, received no House consideration.

The Clayton Act, 15 U.S.C. § 15, was in existence for almost 40 years before the Congress enacted a specific statute of limitations. Congress may well have wanted time to tell how RICO would in fact develop before enacting a specific statute of limitations.

After several years of experience with RICO, and particularly civil RICO, bills to amend RICO, Bills H.R.5445 and S.2907, were introduced in the House of Representatives and the Senate last fall in the final days of the 99th Congress. H.R.5445 was revised to contain, among other amendments, a three-year statute of limitations, and to eliminate the treble damage provision except for defendants who had been previously convicted of the predicate acts or a violation of § 1962. It was passed by the House of Representatives (371-28 vote) on October 7, 1986. An effort by Senator Metzenbaum to attach S.2907, which was almost identical to H.R.5445, to a stop-gap funding bill was blocked by a procedural move on October 17 by a vote of 47-44.

B. *History of Private Civil RICO.*

Although the legislative history set forth above may not be sufficient to state that the Senate and the House of Representatives have specifically rejected a four-year statute of limitations for private civil RICO actions, it must be agreed that the Congress did not include private civil RICO actions as an amendment to the antitrust laws, as was originally proposed. Apparently the Congress did not want to encumber the RICO act with certain excess "baggage," such as its standing requirements and the "antitrust type injury" requirement.

It is well that the Congress waited to see how RICO would be interpreted before considering a statute of limitations. Until the *Sedima* case some Courts were requiring a "racketeering injury." Since that case, it is clear that, if a defendant engages in a pattern of racketeering activity in a manner forbidden by § 1962(c) of the Act, a plaintiff can receive damages for injury caused by a predicate act. Such injuries are often closely akin to the injuries for which state laws grant a cause of action. A RICO predicate act injury is not even superficially similar to the "antitrust type" injury required by the antitrust laws.

The Congress had over 16 years of experience with the operation of private civil RICO when the House of Representatives passed H.R.5445. Although the respondent and amici have stated that the purpose of the civil RICO private right of action was to "eradicate organized crime," the House of Representatives, in eliminating treble damages except in the case of a prior criminal conviction, recognized that private civil RICO was being used in a manner not intended by the original sponsors and, in fact, was not being used to "eradicate organized crime." Utilizing Lexis as a tool, we have fed the names of the defendants in every

reported criminal RICO action into the Lexis bank (352 cases; 1,326 defendant names) in an attempt to determine if any of these defendants were subsequently named in a civil RICO case. In addition, a Lexis search of reported civil RICO cases was conducted in an attempt to determine in how many of these there are references to prior criminal RICO convictions of the civil RICO defendants. We have found that of the 449 reported civil RICO cases, in only five cases were there civil RICO defendants who had been previously named as a defendant in a reported criminal RICO action or convicted of a criminal RICO violation.[3] In none of these cases, with the possible exception of *Anderson*, were the defendants members of what would normally be called "organized crime." It is folly for the respondent to argue that civil RICO should have a long statute of limitations because its purpose is to "eradicate organized crime."

III. The Respondent Has Admitted That It Had No Civil RICO Cause Of Action When Its Agency Agreement Was Terminated.

As was set forth in our principal brief at pages 21 and 22, the respondent admitted in its brief to the Third Circuit that it had no RICO cause of action when the petitioner Crown Life terminated the respondent. In its brief

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[3]*Cullen v. Nassau County Republican Committee*, No. 86-7066 (2d Cir. February 2, 1987) (Available on Lexis; Genfed, Courts) (Macing of county and town employees); *Village of Fox Lake, Illinois v. Waste Management of Illinois, Inc.*, No. 86-C-4888 (N.D. Ill. March 2, 1987) (Available on Lexis; Genfed, Courts) (Bribery of elected officials to obtain garbage contract); *County of Cook v. Lynch*, 648 F. Supp. 738 (N.D. Ill. 1986) (Bribery of officials); *Municipality of Anchorage v. Hitachi Cable, Ltd.*, 547 F. Supp. 633 (D. Alaska 1982) (Bribery of municipal employees in bid-rigging scheme); *Anderson v. Janovich*, 543 F. Supp. 1124 (W.D. Wash. 1982) (Conspiracy to control the tavern business in Pierce County, Washington).

to this Court, the respondent again states, "A cause of action simply cannot accrue before one exists." Page 33.

The respondent argues that the petitioners want to be given a "free first crime" and to do so would frustrate the Congressional purpose of "eradicating organized crime." Page 34. As was set forth above, it is clear that over the 16 years of its existence civil RICO has not been used by private citizens to "eradicate organized crime." The respondent well knows that if it has a legitimate non-RICO cause of action for the so-called "free first crime," it can obtain civil relief.

But of course there is no "free" first bite if there was a conspiracy to violate RICO in existence at the time the plaintiff was injured. Although we made that argument in our principal brief, the respondent at no place in its brief answered our contention that a plaintiff would have a cause of action under § 1962(d) if a conspiracy to commit the pattern of racketeering activities alleged existed at the time of its termination. By stating that it had no cause of action when it was terminated, it has admitted that there was no RICO conspiracy in existence at that time, even though in its complaint it had alleged that defendant Agency Holding Corporation had been appointed as the Crown Life General Agent in Chicago and Cleveland prior to the termination of the respondent. If the alleged RICO conspiracy came into existence at some later date, that ought not to give the respondent a cause of action under § 1962(d) for an injury that took place before the alleged conspiracy began.

A holding, that there is no RICO cause of action for a plaintiff who admits that no cause of action had accrued at the time of his alleged injury, would not permit a "free first

crime" for defendants who had already conspired to commit a pattern of racketeering activity because a cause of action under § 1962(d) in that case accrued at the time of injury. Respondent, however, after having taken extensive discovery and gone through a five-week trial involving most of the same conduct, now insists that it had no cause of action for conspiracy under § 1962(d) or any other subsection of 1962 when it was terminated.

IV. No Reason Exists For Refusing To Apply To The Parties In This Case This Court's Decision As To The Appropriate Limitation Period For Civil RICO Cases.

There is no reason why a decision in this case establishing a method for determining the appropriate statute of limitations for a civil RICO action should not apply to the parties in this case. There has been no line of established cases, upon which any plaintiff or defendant could have relied, that would be overturned by this Court's decision. Respondent points to the fact that at the time it filed its cause of action there was a single district court decision that said that the statute of limitations for fraud in Pennsylvania was six years. Page 38. He could not have relied on that case for not filing prior to February 11, 1980, the expiration of two years after respondent's agency contract was terminated, because it was not decided until 1981. The law review article, cited by respondent in Footnote 41 of its brief as further support for his reliance argument, was published in September, 1980, over six months before the complaint was filed, but eighteen months after February, 1980. In addition, the article states:

> "Although the authors believe that the new six-year 'catch all' limitation period, 42 Pa. Cons. Stat. Ann. § 5527(6) (Purdon 1979), would continue to govern actions in fraud, the matter is not entirely free from

> doubt as the statute is strangely ambiguous and too little time has elapsed since its enactment to have an appellate decision resolving the issue."

Fiebach & Doret, *A Quarter Century Later—The Period of Limitations for Rule 10b-5 Damage Actions in Federal Courts Sitting in Pennsylvania*, 25 Vill. L. Rev. 851, 855 n.26 (1980).

Thus, even the authority relied on by the respondent could not have caused it to be misled. Furthermore, as was pointed out in our principal brief, this is not a fraud case, but an alleged malicious interference with contract claim, and for that the period is two years.

Although the Third Circuit held in *A. J. Cunningham Packing Corp. v. Congress Financial Corp.*, 792 F.2d 330, 337 (3rd Cir. 1986), that the statute of limitations for common law fraud claims in Pennsylvania was six years, a subsequent Pennsylvania Superior Court decision has stated that fraud claims at the relevant time are governed by the two-year statute of limitations. In *Bender v. McIlhattan*, 520 A.2d 37 (Pa. Super. Ct. 1987), the Superior Court referred favorably to *Bickell v. Stein*, 291 Pa. Super. 145, 435 A.2d 610 (1981), which held that the statute of limitations for fraud and tortious interference with contract at the relevant time is two years. 42 Pa. Cons. Stat. Ann. § 5524 (3) and (4) (Purdon 1981). Although it was cited, *Bickell's* holding was ignored by the Third Circuit in *A. J. Cunningham, supra.* In addition, *Bender* cited *Fickinger v. C. I. Planning Corp.*, 556 F. Supp. 434 (E.D. Pa. 1982), which agreed with the holding of *Bickell* that the statute of limitations for fraud is two years. The *Bender* Court concluded that a subsequent amendment that specifically placed "deceit and fraud" under the two-year statute was "designed as a 'catch basin,' and with the intention of

'preventing judicial interpretation that would be contrary to legislative intent.'" *Id.*

Because the Pennsylvania Superior Court has twice gone on record that actions based on fraud during the relevant period are governed by § 5524(3), a two-year statute of limitations, there is nothing inequitable in the Court's holding in this case being applied to a party such as the respondent.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that the judgment of the United States Court of Appeals for the Third Circuit be reversed with instructions that the petitioners' Motion for Summary Judgment on respondent's RICO claim for termination injuries be granted.

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